

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EVIE JOE MORRIS,

Plaintiff,

vs.

TRAVELERS INSURANCE, *et al.*,

Defendants.

Case No.: 2:21-cv-01311-GMN-NJK

ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 5), filed by Defendant Travelers Home and Marine Insurance Company (“Defendant”). Plaintiff Evie Joe Morris (“Plaintiff”) filed a Response, (ECF No. 9), and Defendant filed a Reply, (ECF No. 11).

For the reasons discussed below, the Court **GRANTS in part and DENIES in part** Defendant’s Motion to Dismiss.

I. BACKGROUND

This case arises from a homeowner’s coverage dispute, stemming from a slab leak in the main bathroom of Plaintiff’s home. (*See generally* Am. Compl., ECF No. 1-3). The parties provide a detailed review of the facts alleged in the Amended Complaint, and the background and procedural history of the case in their briefing for the Motion to Dismiss. (Mot. Dismiss (“MTD”) 3:13–7:11, ECF No. 5); (Resp. MTD 2:3–5:28, ECF No. 9). Defendant now moves to dismiss the Amended Complaint for failure to state a claim, and Plaintiff opposes.

II. LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on

1 which it rests, and although a court must take all factual allegations as true, legal conclusions
 2 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
 3 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
 4 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
 5 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
 6 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
 7 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
 8 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
 9 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

10 In considering whether the complaint is sufficient to state a claim, the Court will take all
 11 material allegations as true and construe them in the light most favorable to the plaintiff. *See*
 12 *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). “Generally, a district court may
 13 not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Hal*
 14 *Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
 15 “However, material which is properly submitted as part of the complaint may be considered.”
 16 *Id.* Similarly, “documents whose contents are alleged in a complaint and whose authenticity no
 17 party questions, but which are not physically attached to the pleading, may be considered in
 18 ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.
 19 1994). On a motion to dismiss, a court may also take judicial notice of “matters of public
 20 record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if a
 21 court considers materials outside of the pleadings, the motion to dismiss is converted into a
 22 motion for summary judgment. Fed. R. Civ. P. 12(d).

23 **III. DISCUSSION**

24 Plaintiff brings several claims against Defendants: (1) breach of contract; (2) unfair
 25 claim settlement practices; (3) breach of the implied covenant of good faith and fair dealing; (4)

1 tortious bad faith—breach of fiduciary duty—exemplary damages;¹ and (5) declaratory
 2 judgment.² (*See* Am. Compl. 3:12–10:2). Defendant moves to dismiss Plaintiff’s claims
 3 because she does not plead specific, factual allegations to support them. (*See* MTD 8:3–13:25).
 4 Because the Court dismissed the latter two causes of action, *see supra* notes 1 and 2, the Court
 5 will discuss Plaintiff’s remaining claims in turn.

6 As a preliminary matter, the Court dismisses all claims against Defendants Travelers
 7 Insurance, Travelers Indemnity Company, and Travelers Property Casualty because these
 8 entities are not underwriters of or parties to the insurance policy at issue. *See Vargas v.*
 9 *California State Auto. Ass’n Inter-Ins. Bureau*, 788 F. Supp. 462, 465 (D. Nev. 1992) (“It is
 10 antithetical to the concept of [a] bad faith cause of action to assert that someone who is not a
 11 party to the contract may be liable for violating one of the contract’s implied covenants.”);
 12 *Yoon v. Travelers Indem. Co.*, No. 2:20-cv-1507-JCM-EJY, 2020 WL 7699838, at *2 (D. Nev.
 13 Dec. 28, 2020) (“Nevada’s Unfair Claims Practices Act, [NRS] § 686A.310 *et seq.*, provides a
 14 private right of action for insureds against *insurers* and imposes liability for enumerated unfair
 15 claims practices.”) (emphasis added). Accordingly, the Court dismisses with prejudice all

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 18 ¹ “Nevada law does not recognize a separate ‘breach of fiduciary duty’ claim by an insured against an insurer.”
 19 *Ngan Le v. Sentinel Ins. Co.*, No. 2:14-cv-00747-APG, 2015 WL 685215, at *2 (D. Nev. Feb. 17, 2015); *see also*
 20 *Desert Palace, Inc. v. Ace American Ins. Co.*, 2011 WL 810235 at *4 (D. Nev. Mar. 2, 2011) (“Nevada treats a
 21 breach of the fiduciary nature of the insurer-insured relationship [as] part of the duty of good faith and fair
 22 dealing, not a separate tort claim. . . . Nevada does not recognize breach of fiduciary duty claims alleged against
 23 an insurer by its insured.”) (quotations omitted). Further, Plaintiff’s claim of bad faith is duplicative because a
 bad faith claim equates to a claim for breach of the implied covenant of good faith and fair dealing. *See Rosas v.*
GEICO Cas. Co., 365 F. Supp. 3d 1123, 1126–27 (D. Nev. 2019). Finally, exemplary (*i.e.*, punitive) damages
 are “a form of relief and not an independent cause of action.” *Villeda v. GEICO Casualty Company*, 2:21-cv-
 00278-GMN-NJK, 2021 WL 3742020, at *3 (D. Nev. Aug. 24, 2021). Accordingly, the Court dismisses with
 prejudice Plaintiff’s tortious bad faith—breach of fiduciary duty—exemplary damages claim. Plaintiff, however,
 may still seek exemplary damages as a remedy if it so wishes.

24 ² “[D]eclaratory relief is merely a remedy, not a stand-alone cause of action.” *Herrera v. Nationstar Mortg.,*
 25 *LLC*, No. 2:16-cv-01043-GMN-GWF, 2017 WL 1091788, at *4 (D. Nev. Mar. 22, 2017) (citations omitted).
 Accordingly, the Court dismisses with prejudice Plaintiff’s independent *cause of action* for declaratory relief as a
 matter of law. Plaintiff, however, may still seek declaratory relief as a remedy. Although Defendant argues the
 Court should deny this remedy because Plaintiff does not state a claim for breach of contract, the Court holds
 otherwise, as discussed in more detail below.

claims against Defendants Travelers Insurance, Travelers Indemnity Company, and Travelers Property Casualty.

A. Breach of Contract

Plaintiff claims Defendants breached the terms of the insurance policy because they did not and refused to compensate Plaintiff for the losses she incurred because of the covered claim. (Am. Compl. ¶ 33). Defendant argues Plaintiff fails to support this claim with specific, factual allegations. (MTD 4:11–22). “To prove a breach of contract, the plaintiff must show an existing valid agreement with the defendant, the defendant’s material breach, and damages.” *Brochu v. Foote Enterprises, Inc.*, 381 P.3d 596 (Nev. 2012). Here, a valid agreement exists in the form of a homeowner’s policy of insurance, policy number 600709054 633 1 (the “Policy”).³ (See generally Travelers Issued Policy No. 600709054 033 1, Ex. A to MTD, ECF No. 5-1). To start, Plaintiff repeatedly references a “General Allegations” section of the Complaint to support several of her causes of action, but this section does not exist in the Complaint. (See Am. Compl. ¶¶ 16, 34, 39, 46); (see generally Am. Compl.). Despite that, Plaintiff pleads with sufficient specificity how Defendants purportedly breached the Policy. For instance, Plaintiff states the date she purchased the Policy, the language of the Policy, the date she submitted a claim under the Policy, Defendant’s response to her claim wherein Defendant allegedly failed to adequately investigate the causes of the damage to her home, the accommodations Defendant provided under the Policy, Defendant’s alleged failure to provide reasonable coverage, and Defendant’s denial of Plaintiff’s claim. (Am. Compl. ¶¶ 12–13, 16–32). However, Plaintiff fails to allege with specific, factual allegations the damages she suffered as a result of Defendant’s alleged breach of the Policy. (See *id.* ¶¶ 11–36). Plaintiff

³ The Court may consider the certified copy of the Policy, which is referenced in the Amended Complaint and upon which Plaintiff’s claims are based, without converting the instant Motion to a motion for summary judgment. See *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003) (“A court may . . . consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.”).

1 states she was damaged but does not assert how or any concrete figures. (*See id.* ¶ 33–35).
2 Accordingly, the Court dismisses without prejudice Plaintiff’s breach of contract claim.

3 **B. Unfair Claim Settlement Practices**

4 Plaintiff’s second cause of action alleges violations under the Unfair Claims Practices
5 Action (“UCPA”) under NRS 686A.310. (Am. Compl. ¶¶ 37–41). Defendant moves to dismiss
6 this claim because Plaintiff merely copies and pastes the UCPA statutory subsections into the
7 Complaint without further explanation. (MTD 11:3–7). NRS 686A.310 specifies certain unfair
8 practices by insurance companies and provides a cause of action for an insured to enforce these
9 provisions against an insurer. *See* NRS 686A.310; *Hart v. Prudential*, 848 F. Supp. 900, 903
10 (D. Nev. 1994). “Unlike a cause of action for bad faith, the provisions of NRS § 686A.310
11 address the manner in which an insurer handles an insured’s claim whether or not the claim is
12 denied.” *Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1236 (D. Nev.
13 2010).

14 Here, as Defendant correctly points out, Plaintiff does nothing to defend this claim other
15 than by stating that she “has demonstrated the facts necessary to support the claims for relief as
16 alleged in the Complaint.” (*See* Resp. MTD 6:18–19). Because she fails to present points and
17 authorities in response to Defendant’s MTD, the Court grants dismissal of Plaintiff’s UCPA
18 claim. *See* LR 7-2(d) (“The failure of an opposing party to file points and authorities in
19 response to any motion . . . constitutes a consent to the granting of the motion.”).

20 Notwithstanding dismissal under LR 7-2(d), Plaintiff’s Complaint also fails to include specific,
21 factual allegations to support her claim that Defendants used unfair practices in settling claims.
22 Plaintiff’s UCPA claim merely parrots NRS 686A.310 without providing anymore detail.

23 Accordingly, the Court grants dismissal of Plaintiff’s UCPA claim without prejudice.

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C. Breach of the Implied Covenant of Good Faith and Fair Dealing

Next, Plaintiff alleges that Defendant acted in bad faith when it denied or provided insufficient coverage for the damages she sustained because of her covered loss. (*See* Am. Compl. ¶¶ 44–45). Defendant contends Plaintiff fails to allege with specificity the damages she “incurred in living expenses or why the amount [Defendant] is alleged to have paid is unreasonable.” (Resp. MTD 12:22–25).

A plaintiff must establish the following to succeed on a claim for breach of the implied covenant of good faith and fair dealing: (1) a contract between the parties exists; (2) the defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) the plaintiff’s justified expectations under the contract were denied. *See Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995) (citing *Hilton Hotels v. Butch Lewis Productions*, 808 P.2d 919, 923 (Nev. 1991)). “Bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct.” *Guar. Nat. Ins. Co. v. Potter*, 912 P.2d 267, 272 (Nev. 1996).

Here, a valid contract exists in the form of the Policy. (*See generally* Travelers Issued Policy No. 600709054 033 1, Ex. A to MTD). That Policy provides that in return for the premium Plaintiff paid, Defendant will provide insurance to cover the cost of damage to the property. (*See id.* at 12, 14, Ex. A to MTD). The Policy also states that if loss covered under the Policy makes part of the property uninhabitable, Defendant will “cover any necessary increase in living expenses incurred by [the policyholder] so that your household can maintain its normal standard of living.” (*Id.* at 16, Ex. A to MTD). Plaintiff includes allegations lending support to the notion that Defendant acted in a manner unfaithful to the purpose of the Policy and that Plaintiff’s justified expectations under the Policy were denied. For instance, she alleges that Defendant: (1) did not adequately investigate the causes of the damage to her home; (2) “disregarded various attempts to reach a reasonable form of coverage”; (3) used delay

tactics before providing coverage; (4) told Plaintiff to vacate the temporary housing initially provided under the Policy during the COVID-19 pandemic; and (5) denied coverage without addressing issues she raised. (*See* Am. Compl. ¶¶ 24–26, 28–32). Plaintiff sufficiently pleads with enough specificity that Defendant acted unreasonably and with knowledge that there was no reasonable basis for its conduct. *Potter*, 912 P.2d at 272; (*see* Am. Compl. ¶¶ 26, 28–30) (alleging that Defendant intended to force Plaintiff to vacate the temporary housing provided under the Policy before Plaintiff’s counsel sent it a letter of representation and demanding Defendant to reconsider its position). Accordingly, the Court denies dismissal of Plaintiff’s good faith and fair dealing claim.

D. Leave to Amend

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, the Court grants Plaintiff leave to amend her Complaint to include more specific, factual allegations to support her breach of contract and UCPA claims. Regarding her breach of contract claim, based on the factual allegations Plaintiff includes to support the first two elements of breach, it is possible for Plaintiff to include more specific, factual allegations concerning the damages she suffered as a result of Defendant’s alleged breach of the Policy. As to her UCPA claim, it is not clear that Plaintiff cannot cure the deficiencies by amending her claim. She includes specific allegations in other sections of her Complaint showcasing

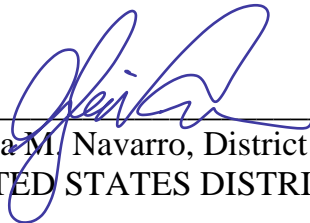
1 Defendant's purported misconduct; all that is required of her is to provide more factual
2 allegations to support her contentions that Defendant used unfair practices in settling claims.
3 Thus, Plaintiff will be able to amend her Complaint to cure the deficiencies noted above. If
4 Plaintiff seeks to amend claims the Court dismisses without prejudice, she will have twenty-one
5 (21) days after the Court enters this Order to file a Second Amended Complaint.

6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss, (ECF No. 5), is
8 **GRANTED in part and DENIED in part**, consistent with this Order.

9 **IT IS FURTHER ORDERED** that if Plaintiff seeks to amend claims dismissed without
10 prejudice, Plaintiff shall file an amended complaint within twenty-one (21) days from the entry
11 of this Order.

12 **DATED** this 23 day of November, 2022.

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16 Gloria M. Navarro, District Judge
17 UNITED STATES DISTRICT COURT
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